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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY MICHAEL LANE,

Defendant and Appellant.

C059605

(Super. Ct. No. CM029369)

A jury found defendant Jeffrey Michael Lane guilty of three felonies -- being a felon in possession of a firearm, being a felon in possession of ammunition, and possessing a loaded firearm while unlawfully under the influence of methamphetamine -- and one misdemeanor -- falsely identifying oneself to a peace officer. The trial court found defendant had served a prior prison term and had a prior serious felony conviction. The court sentenced defendant to an aggregate prison term of nine years eight months.

On appeal, defendant contends: (1) the evidence was insufficient to prove he was under the influence of

methamphetamine; (2) the trial court abused its discretion in denying his new trial motion based on the insufficiency of the evidence by relying on irrelevant evidence of his marijuana use; (3) the trial court erred by failing to instruct the jury that falsely identifying oneself to a peace officer is a specific intent crime; (4) the trial court erred in failing to conduct a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 to inquire about ineffective assistance of counsel asserted as a basis for a new trial; (5) the evidence was insufficient to prove he had a prior strike conviction when, as a juvenile (charged as an adult), he admitted violating Penal Code¹ section 243, subdivision (d) (battery with serious bodily injury); (6) imposition of three prior prison term enhancements based on one prior prison term was error; (7) section 654 requires that the punishments for being a felon in possession of ammunition and possessing a loaded firearm while unlawfully under the influence of methamphetamine be stayed; (8) the trial court erred by imposing consecutive sentences for being a felon in possession of ammunition and possessing a loaded firearm while unlawfully under the influence of methamphetamine because the offenses were not predominantly independent of each other; (9) the trial court's reliance on the prior prison term to impose the upper term constituted unauthorized dual use of facts; and (10) the recent amendment to section 4019 requires that defendant receive

¹ All further section references are to the Penal Code unless otherwise indicated.

257 presentence credits rather than the 193 currently listed on the abstract of judgment.

We conclude the trial court erroneously used the prior prison term to enhance the sentences on all three felony counts, and defendant's punishment for possessing a loaded firearm while unlawfully under the influence of methamphetamine must run concurrently and be stayed pursuant to section 654, but we otherwise reject defendant's claims of prejudicial error. Accordingly, we will modify the judgment to correct the sentencing errors and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Around 11:00 p.m. on March 25, 2008, Butte County Sheriff's Deputy Brett Gassaway was driving a marked patrol car when he saw defendant running in all black clothing. The deputy sped up to get a closer look. As he approached, Deputy Gassaway noticed defendant was not running normally but with his arms in front of him. The deputy decided to pursue defendant and activated his overhead lights. Defendant looked back at the patrol car and began to run faster.

Deputy Gassaway maneuvered his car in front of defendant, jumped out, and drew his weapon. Defendant threw something, and when Deputy Gassaway heard it hit the ground, he knew it was a firearm. As Deputy Gassaway yelled at defendant to get on the ground, defendant continued to run toward the deputy for a few paces before turning around and running back toward where he had thrown the firearm. As Deputy Gassaway pursued defendant,

defendant "kind of dove onto the ground" within a few feet of the firearm.

After Deputy Gassaway placed defendant in handcuffs, defendant identified himself as Zach Smith. The deputy responded, "You're [sic] name is not Zach Smith," to which defendant responded with his true name, Jeffrey Lane.

A couple of feet from defendant, the deputy discovered a .22-caliber bolt-action rifle that had been thrown over a four-foot-high cyclone fence. The rifle was loaded with a magazine that had several rounds in it and had a spent cartridge in the chamber. Next to the rifle was a box of .22-caliber ammunition.

After arresting defendant, Deputy Gassaway noticed defendant was unable to stop moving his fingers. Defendant also twitched quite a bit and was sweating profusely. Based on the deputy's experience and training, he knew that persons under the influence of methamphetamine continuously move their fingers and are unable to hold still.

Deputy Gassaway took defendant to the Oroville Medical Center for a blood draw. During the 15 to 20 minutes before they arrived at the medical center, the deputy observed no decrease in defendant's twitchy behavior.

Forensic toxicologists tested a sample of defendant's blood and found traces of methamphetamine and marijuana. The toxicologist who tested for the presence of methamphetamine testified that the sample contained a trace amount of methamphetamine -- less than one nanogram per liter. The toxicologist who tested for the presence of marijuana metabolite

testified that defendant had ingested marijuana about an hour or two before the blood draw.

As previously noted, a jury found defendant guilty of being a felon in possession of a firearm, being a felon in possession of ammunition, possessing a loaded firearm while unlawfully under the influence of methamphetamine, and falsely identifying himself to a peace officer. The trial court found defendant had served a prior prison term and had a prior serious felony conviction.

At sentencing, the court designated the charge of being a felon in possession of a firearm as the principal term and imposed the upper term of six years for that crime,² plus one year for the prior prison term pursuant to section 667.5, subdivision (b). The court also stated that it was imposing the upper terms for the subordinate counts of being a felon in possession of ammunition and possessing a loaded firearm while unlawfully under the influence of methamphetamine, but the court imposed 16 months (one-third the middle term) for each of those crimes to be served consecutively to the principal term. The court also stated it was staying the prior prison term enhancement under section 667.5, subdivision (b) as to each of those counts. Finally, the court imposed a concurrent six-month term for the misdemeanor count of falsely identifying oneself to

² Because the trial court found defendant had a prior serious felony conviction, the basic felony triad of 16 months, 2 years, or 3 years (§ 18) that applied to all three felonies of which defendant was convicted was doubled (§ 1170.12, subd. (c)(1)).

a peace officer. The aggregate unstayed prison term was nine years and eight months.

DISCUSSION

I

There Was Sufficient Evidence That Defendant Was Under The Influence Of Methamphetamine

Subdivision (e) of Health and Safety Code section 11550 makes it a crime to be "unlawfully under the influence of cocaine, cocaine base, heroin, methamphetamine, or phencyclidine while in the immediate personal possession of a loaded, operable firearm." Here, defendant contends the evidence was insufficient to prove he was under the influence of methamphetamine. We disagree.

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence--that is, evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

Here, Deputy Gassaway testified he had taken several police training courses dealing with controlled substances, including methamphetamine. The course covered how a person demonstrates having used methamphetamine. As a deputy sheriff, Deputy Gassaway had arrested and assisted with the arrests of approximately 100 persons for being under the influence of methamphetamine. His observations of those persons were consistent with what he had been taught. Defendant's behavior -- continuously moving his fingers and being unable to hold still -- was the same behavior he had previously observed in people under the influence of methamphetamine.

Deputy Gassaway acknowledged that the effect of methamphetamine should be to dilate the pupils but he observed that defendant's pupils were "restricted" -- i.e., smaller than normal -- at the time of arrest. Nevertheless, based on defendant's "hand movement, not being able to control, just making movements for no apparent reason," Deputy Gassaway felt defendant was under the influence of methamphetamine. Deputy Gassaway testified that unlike methamphetamine use, marijuana use will cause the pupils to be restricted.

The toxicologist who tested defendant's blood for methamphetamine confirmed that methamphetamine causes "[t]he eye [to] get dilated."

Defendant argues that the evidence of a "'trace'" amount of methamphetamine in his blood and Deputy Gassaway's testimony of what he observed are insufficient to prove defendant was under the influence of methamphetamine. Specifically, defendant

argues "there was no substantial evidence that the 'trace' amounts of methamphetamine could have created physical symptoms or that the deputy's observed symptoms were the result of the presence of 'trace' methamphetamine."

Subdivision (e) of Health and Safety Code section 11550 sets no minimum threshold for the amount of a controlled substance that must be found in a person's blood for the person to be "under the influence" of that substance. "One may be guilty of *being* under the influence of drugs in violation of Health and Safety Code section 11550 by being in that state in any detectable manner: "'The symptoms of being under the influence within the meaning of that statute are not confined to those commensurate with misbehavior, nor to those which demonstrate impairment of physical or mental ability.'"

(*People v. Canty* (2004) 32 Cal.4th 1266, 1278, quoting *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665.)

Here, Deputy Gassaway testified that the behavior he saw defendant engaging in -- continuously moving his fingers and being unable to hold still -- was the same behavior he had seen in people being arrested for being under the influence of methamphetamine, and this behavior was consistent with what he had been taught in police training courses about how a person demonstrates having used methamphetamine. Combined with the evidence that defendant had methamphetamine in his blood, Deputy Gassaway's testimony was sufficient to support a finding that defendant was under the influence of methamphetamine.

Defendant contends "Deputy Gassaway's testimony . . . should not be given much weight" because he "was a rookie officer with less than a year and a half of experience on the street" and he "never testified that he had confirmed his suspicions that [the persons he had seen being arrested for being under the influence of methamphetamine] were [actually] under the influence by later checking their chemical test results." Defendant also argues that Deputy Gassaway's opinion that his odd behavior was the result of being under the influence of methamphetamine "lacks sufficient foundation" because "Deputy Gassaway was never asked whether in his opinion these symptoms could only be the result of methamphetamine use."

We reject both of these contentions. The weight to be given a police officer's testimony about whether a person is under the influence of a narcotic is for the jury (see *People v. Moore* (1945) 70 Cal.App.2d 158, 165), and on appeal we do not reweigh the evidence (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13). For our purposes, it is enough that Deputy Gassaway was taught how a person under the influence of methamphetamine behaves and the behavior of defendant that he observed was consistent with what he had been taught. Based on this evidence, combined with the evidence of methamphetamine in defendant's blood, the jury reasonably could have found beyond a reasonable doubt that defendant was under the influence of methamphetamine, notwithstanding defendant's arguments to the contrary. That defendant's pupils were restricted rather than dilated could be attributed to the fact that he had used

marijuana as well as methamphetamine. Consequently, the evidence in support of defendant's conviction of possessing a loaded firearm while unlawfully under the influence of a controlled substance was sufficient.

II

The Trial Court Did Not Abuse Its Discretion In Denying Defendant's New Trial Motion Based On The Sufficiency Of The Evidence That He Was Under The Influence Of Methamphetamine

Defendant moved for a new trial on the ground (among others) that "the verdict [wa]s contrary to the . . . evidence." In support of that contention he argued "there was insufficient evidence to warrant a conviction of being under the influence of a controlled substance while in possession of a firearm" because "[t]he toxicologist could not determine when Defendant ingested the methamphetamine" and "the toxicologist testified that methamphetamine metabolizes into amphetamine in the human body and Defendant's blood sample showed no sign of amphetamine!"³

In opposition to defendant's motion, the prosecutor argued that the evidence showed "that defendant displayed a 'detectable abnormal physical condition' which was witnessed by a trained and experienced officer," and "the blood draw simply showed that

³ Although defendant's argument suggested the toxicologist's finding was unusual, the toxicologist actually testified that "[u]sually when we have [a] low amount of methamphetamine, we don't see amphetamine." And the toxicologist made it clear that he was not saying there was *no* amphetamine in defendant's blood but only that there was no *detectible amount* of amphetamine in defendant's blood.

the deputy was accurate in his assessment that what was influencing the defendant was methamphetamine."

In arguing the motion, defense counsel asserted "there needs to be a nexus" between the use of methamphetamine and the observed behavior, and here there was none because "[t]here was no amphetamine found in [defendant]'s system, which would either indicate a distant use where the amphetamine had been expelled or more recent use to where it hasn't even been metabolized, and consequently he would not be under the influence."

In ruling on this aspect of the new trial motion, the trial court stated "there was testimony at trial as to drug use which included not only methamphetamine but THC, the active ingredient in marijuana. The testimony as to a trace amount was as to [a] trace amount of methamphetamine and presence of marijuana. [¶] Therefore, the jury could have and did determine based on those, . . . as well as the police officer[]'s testimony that the defendant was under the influence."

On appeal, defendant contends the trial court abused its discretion in denying his new trial motion because the court erroneously relied on irrelevant evidence of his marijuana use in weighing the evidence and concluding it was sufficient to find he was under the influence. We are not persuaded.

"Penal Code section 1181, subdivision (6) permits a defendant to move for a new trial on the ground that the verdict is contrary to the evidence. In deciding such a motion, the trial court's function is to 'see that the jury intelligently and justly perform[ed] its duty and, in the exercise of a proper

legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict.' [Citation.] The trial court's duty is to review the evidence independently and satisfy itself that the evidence as a whole is sufficient to sustain the verdict." (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1251.) "A trial court may grant a motion for new trial only if the defendant demonstrates reversible error. . . . On appeal, a trial court's ruling on a motion for new trial is reviewed for abuse of discretion. [Citation.] Its ruling will not be disturbed on appeal "unless a manifest and unmistakable abuse of discretion clearly appears."" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159-1160.)

Here, we cannot say the trial court manifestly and unmistakably abused its discretion in denying defendant's new trial motion based on the sufficiency of the evidence that he was under the influence of methamphetamine. As we have concluded already ourselves, the evidence was sufficient to prove beyond a reasonable doubt that defendant was under the influence of methamphetamine. Moreover, in our view the trial court's mention of the evidence that defendant had used marijuana as well as methamphetamine does not manifestly and unmistakably indicate that the trial court *relied* on that evidence in denying his new trial motion.

Remember, defendant's challenge to the sufficiency of the evidence was premised solely on the toxicologist's testimony that he found no amphetamine in defendant's blood. In essence, it was defendant's position that in the absence of evidence of

metabolized amphetamine in his blood, there was no substantial basis for concluding he was under the influence of methamphetamine because the absence of amphetamine meant that his methamphetamine use was either too "distant" or too "recent" for him to be under the influence.

In the context of this argument, the trial court's mention that defendant's blood sample indicated his use of both methamphetamine and marijuana prior to his arrest did not necessarily mean the trial court was *relying* on the evidence of defendant's marijuana use in finding sufficient the evidence that defendant was under the influence. Rather, it reasonably appears that the trial court's recitation of the evidence relating to defendant's marijuana use was perfunctory and superfluous, and the trial court actually premised its denial of defendant's motion on the fact that the jury could have found defendant was under the influence based on the evidence of a trace amount of methamphetamine in defendant's blood and Deputy Gassaway's testimony about defendant's behavior being consistent with someone who is under the influence of methamphetamine. For this reason, we conclude defendant has failed to show an abuse of discretion in the denial of his new trial motion based on the sufficiency of the evidence that he was under the influence.

III

*The Erroneous Instruction On The Crime
Of Falsely Identifying Oneself To A Peace Officer
Was Harmless Beyond A Reasonable Doubt*

On the charge of falsely identifying oneself to a peace officer, the trial court instructed the jury as follows:

"The defendant is charged . . . with falsely representing or identifying himself as another person or as a fictitious person to a peace officer upon a lawful detention or arrest to either evade the process of the court or to evade the proper identification of the person by the investigating peace officer. A person employed as a deputy sheriff is a peace officer. The lawful duties of a deputy sheriff include detention and arrest.

"To prove that the defendant is guilty of this crime the People must prove that; one, Deputy Gassaway was a peace officer lawfully performing or attempting to perform his duties as a peace officer; two, the defendant falsely represented or identified himself as another person or as a fictitious person to Deputy Gassaway; three, Deputy Gassaway was in the performance or attempted performance of his duties as a peace officer; four, when the defendant acted he knew or reasonably should have known that Deputy Gassaway was a peace officer performing or attempting to perform his duties."

On appeal, defendant contends the trial court misinstructed the jury because "[t]he trial court never instructed the jury that it had to find that [he] had the specific intent to avoid court process when he falsely identified himself. Although the

jury was informed of this fact in the instruction's prefatory paragraph, it was not included as an element of the offense that the [P]eople had to prove beyond a reasonable doubt."

Initially we note that defendant's argument mischaracterizes the crime at issue. In his opening brief at least, defendant repeatedly argues that he must have had "the specific intent to avoid court process" to be guilty of falsely identifying himself to a peace officer. But subdivision (a) of section 148.9 actually provides as follows: "Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer . . . upon a lawful detention or arrest of the person, *either to evade the process of the court, or to evade the proper identification of the person by the investigating officer* is guilty of a misdemeanor." (Italics added.) Thus, to be guilty of falsely identifying oneself to a peace officer, a person need not have intended to "evade the process of the court." The crime can also be committed if the person's intent was "to evade the proper identification of the person by the investigating officer."

That being said, there is no question the crime of falsely identifying oneself to a peace officer *is* a specific intent crime. (See *In re Kelly W.* (2002) 95 Cal.App.4th 468, 472-473 ["it was the prosecution's burden to prove Kelly intended to evade the process of the court, or to evade proper identification"].) Furthermore, in identifying the elements the People had to prove for the jury to find defendant guilty of the

crime, the trial court did not tell the jury the People had to prove that defendant misidentified himself either to evade the process of the court or to evade the proper identification of himself by the investigating officer. Although, as defendant notes, that element was mentioned in the prefatory paragraph identifying the crime with which defendant was charged, the court never told the jury the People had to prove the purpose of defendant's misidentification. This was error. (See *People v. Brenner* (1992) 5 Cal.App.4th 335, 339 [the trial court has a sua sponte duty to instruct that specific intent is required for a crime, and it is error not to do so].)

Having concluded the trial court erred in its instruction on the elements of the crime, we consider whether that instruction was nonetheless harmless beyond a reasonable doubt. (See *People v. Hughes* (2002) 27 Cal.4th 287, 253.) We conclude it was. On the evidence here, no plausible explanation existed for defendant giving a false name to Deputy Gassaway other than to prevent the deputy from properly identifying him. Indeed, as defendant himself suggests, the most plausible reason for him to misidentify himself was "to avoid a felony charge for [being a] felon in possession of a weapon."

In his reply brief, defendant hypothesizes several reasons why a person might give "the wrong name to an officer besides wanting to avoid court process or be identified by the officer," but he fails to link any of those situations to the facts of this case. To the extent he reiterates that he might have misidentified himself "to conceal his status as a felon," that

only supports his conviction because if he told Deputy Gassaway he was Zach Smith to conceal his status as a felon, then he was obviously trying "to evade the proper identification of [himself] by the investigating officer." As for his hypothesis that his false identification of himself "could have been the result of marijuana's psychotropic effects," defendant does not point to any evidence supporting that hypothesis other than the evidence that he had smoked marijuana one or two hours before the blood test, which was 15 to 20 minutes after his arrest. By itself, however, that evidence was not sufficient to suggest an alternate reason why defendant might have told Deputy Gassaway his name was Zach Smith. Indeed, on the evidence here, no reasonable jury could have found defendant gave a false name accidentally or with any intent other than to avoid being identified by the deputy who was arresting him. Accordingly, we reject defendant's assertion of prejudicial instructional error.

IV

The Trial Court Did Not Err In Failing To Conduct A Marsden Hearing In Response To Defendant's New Trial Motion

In addition to moving for a new trial based on insufficiency of the evidence (discussed above), defendant moved for a new trial on the ground he "was denied a fair and impartial trial, due to the ineffective assistance of counsel." In support of this assertion, defense counsel filed a memorandum of points and authorities that asserted as follows:

"It is well established that ineffective assistance of trial counsel deprives a defendant [of] due process of a constitutional dimension, which can justify granting a motion for new trial. People v. Fosselman (1983) [33] Cal.3d 572, 582-3.

"As pointed out by the Court in Fosselman: [¶] '[I]n appropriate circumstances justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is able to determine the effectiveness issue on such motion, it should do so.' Ibid.

"In the present case Defendant was deprived a fair trial due to ineffective assistance of counsel."

The memorandum of points and authorities did not identify any particular act or omission claimed to constitute ineffective assistance of counsel. Furthermore, at the hearing on the motion, defense counsel failed to identify any particular deficiency in his performance. Indeed, he offered no argument on this aspect of the new trial motion.

Upon submission of the matter, the trial court ruled as follows: "There were several grounds that were cited. Two grounds, ineffective assistance of counsel. The Court on that ground does not find after I heard the trial that counsel provided ineffective assistance. Counsel has filed numerous motions over the course of this case and made appropriate

arguments and questions during the trial. Motion for a new trial is denied as to that ground."

Neither defense counsel nor defendant objected to the court's ruling or attempted to offer any further argument on the point. Indeed, defendant never personally asserted to the court that he believed his attorney's representation had been inadequate or ineffective. The only such assertion came in the form of the pro forma new trial motion filed by defense counsel.

On appeal, defendant contends he was denied his right to conflict-free, effective assistance of counsel when the trial court failed to conduct a *Marsden* hearing and inquire into the existence of a conflict after defense counsel asserted in the new trial motion that he was ineffective. Defendant asserts that "when trial counsel stated that he had rendered ineffective assistance of counsel in his motion, the trial court should have conducted a *Marsden* hearing and appointed separate counsel to assist [defendant] with the new trial motion, so as to determine if trial counsel had rendered ineffective assistance of counsel and whether the conflict of interest was temporary . . . or permanent."

We find no error because defendant's right to a *Marsden* hearing was not implicated by *his attorney's* pro forma claim of incompetent representation in the new trial motion. "The court's duty to conduct the inquiry [under *Marsden*] arises 'only when *the defendant* asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.'" (*People v. Lara*

(2001) 86 Cal.App.4th 139, 150, *italics added*.) In short, *Marsden* issues arise only when *the defendant* personally complains about counsel to the court. Here, trial counsel alleged his own deficient representation; defendant said nothing.

This court's recent decision in *People v. Richardson* (2009) 171 Cal.App.4th 479 supports our conclusion. In *Richardson*, the court held there was no error in failing to conduct a *Marsden* hearing "because a request for new trial based on a defendant's claim of ineffective assistance of counsel does not trigger the court's duty to conduct a *Marsden* hearing if the defendant's desire for substitute counsel is not made clear." (*Id.* at p. 484.) Here, defense counsel's pro forma assertion of ineffective assistance of counsel in the memorandum of points and authorities in support of the new trial motion did not, by any means, "ma[k]e clear" that defendant wanted substitute counsel.

Defendant contends that "to the extent that a defendant must affirmatively request substitution because of incompetence, such a requirement is not necessary when trial counsel alleges on his own that he was ineffective" because "[r]equiring [the defendant] to make a request for substitution [in that circumstance] would be redundant and improperly shift safeguarding his constitutional rights to a lay person, where it is the trial court's inherent obligation to supervise the performance of defense counsel to ensure that adequate representation had been provided and would continue to be

provided.” We disagree. Here, the trial court fulfilled its “obligation to supervise the performance of defense counsel to ensure that adequate representation is provided” (*People v. McKenzie* (1983) 34 Cal.3d 616, 630, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365) when, despite defense counsel’s entirely perfunctory and undeveloped assertion of ineffective assistance in the new trial motion, the court assessed counsel’s performance as the court had observed it and concluded it was not deficient. Absent any personal assertion of inadequate representation by defendant, the court did not have a duty to do any more. Accordingly, the court did not err in failing to conduct a *Marsden* hearing in response to the new trial motion.

V

*There Was Sufficient Evidence That Defendant’s
Prior Felony Conviction Qualified As A Strike*

Defendant contends there was insufficient evidence to support the trial court’s finding that his prior conviction for battery causing serious bodily injury constituted a strike. We disagree.

To prove the prior strike conviction, the prosecution introduced a packet pursuant to section 969b.⁴ The contents of

⁴ In pertinent part, section 969b provides that “[f]or the purpose of establishing prima facie evidence of the fact that a person being tried for a crime . . . has been convicted of an act punishable by imprisonment in a state prison, county jail or city jail of this state, and has served a term therefor . . . , the records or copies of records of any state

the packet showed that defendant was charged as an adult in August 2000 for a crime he committed as a juvenile. Originally the sole count of the information alleged that defendant committed the crime of assault with a deadly weapon or by means of force likely to produce great bodily injury. (§ 245, subd. (a)(1).) The information specifically alleged that defendant "did willfully and unlawfully commit an assault upon MICHAEL LYNN COLLINS with a deadly weapon, to wit, a KNIFE, and by means of force likely to produce great bodily injury." The information also contained a special allegation of great bodily injury, which "further alleged as to Count 1 that in the commission of the above offense the said defendant . . . personally inflicted great bodily injury upon MICHAEL LYNN COLLINS, not an accomplice to the above offense"

In October 2000, defendant entered into a plea agreement under which a second count -- this one for battery with serious bodily injury (§ 243, subd. (d)) -- was added to the information. As to this second count, the following was handwritten on the information: "ADD. CT #2 PC 243(d) 10-17-00." Pursuant to the plea agreement, defendant pled no contest to the charge of battery with serious bodily injury in exchange for dismissal of the charge of assault with a deadly weapon or by means of force likely to produce great bodily injury and no immediate prison time.

penitentiary . . . , when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence."

On the plea form, defendant checked the box indicating "THE OFFENSE TO WHICH I HAVE PLED MAY BE ALLEGED AS A SENTENCING ENHANCEMENT IN ANY FUTURE FELONY PROSECUTION AS . . . [X] A 'STRIKE' UNDER THE THREE STRIKES LAW OF CALIFORNIA."

The court's minute order noted the dismissal of Count 1 as follows: "PC 245(a)(1) - Ct 1 Dismissed."

Section 667, subdivision (d) provides in pertinent part that "for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as: [X] (1) . . . any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state." Section 1192.7, subdivision (c)(8) provides in relevant part that "'serious felony' means any of the following: [X] . . . [X] any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice"

Under the foregoing provisions, a violation of section 243, subdivision (d) qualifies as a serious felony when the record shows that the defendant personally inflicted great bodily injury on a person other than an accomplice. (§§ 667, subd. (b), 1192.7, subd. (c)(8).) It has been held that "the element of 'serious bodily injury,' as required for felony battery, is essentially equivalent to or synonymous with 'great bodily injury' for the purpose of a 'serious felony' sentence enhancement pursuant to Penal Code sections 667, subdivisions (a) and (d), and 1192.7, subdivision (c)(8)." (*People v. Moore* (1992) 10 Cal.App.4th 1868, 1871.) Thus, the trial court

properly found that defendant had a prior strike conviction as long as the victim of his battery was not an accomplice.

In reviewing the record of defendant's prior conviction, we bear in mind the California Supreme Court's guidance that "[a] negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles.

[Citations.] 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.)'" (*People v. Shelton* (2006) 37 Cal.4th 759, 767, quoting *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265.)

In this case, the record suffices to prove that defendant's prior conviction of battery with serious bodily injury constituted a strike. Granted, the special allegation that defendant's victim, Michael Lynn Collins, was not his accomplice was dismissed along with the charge of assault with a deadly weapon or by means of force likely to produce great bodily injury to which it related. However, defendant expressly acknowledged in the plea form that the offense to which he pled could be alleged as a strike in any future felony prosecution. The only reasonable interpretation of this language is that defendant acknowledged his offense constituted a strike at the time he entered his plea. By acknowledging that his offense could be alleged as a strike in the future, defendant admitted that his offense satisfied the statutory criteria for a strike. Because the statutory criteria for this strike (§ 1192.7,

subd. (c)(8)) were the same in 2000 as they were at the time of defendant's trial in this case (see Stats. 1999, ch. 298), defendant necessarily admitted that his prior offense constituted a strike under current law. Thus, he effectively admitted that his offense involved the infliction of great bodily injury on a person who was not an accomplice.

Based on the foregoing, the trial court correctly found that defendant's prior conviction of battery with serious bodily injury constituted a strike.

VI

The Trial Court Erred In Imposing Multiple Sentence Enhancements Pursuant To Section 667.5, Subdivision (b)

Defendant contends the trial court erred by imposing three sentence enhancements for his prior prison term pursuant to section 667.5, subdivision (b) but staying two of those enhancements. Defendant correctly points out that a sentence enhancement for a prior prison term, which goes to the nature of the offender rather than the nature of the offense, may be imposed only once in arriving at an aggregate sentence. (*People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on others grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401.) The People agree. Accordingly, we will strike the two prison prior sentence enhancements the trial court imposed but stayed.

VII

*The Trial Court Did Not Err In Failing To Stay The Sentence
For Being A Felon In Possession Of Ammunition But Did Err In
Failing To Stay The Sentence For Possessing A Loaded Firearm
While Unlawfully Under The Influence Of Methamphetamine*

Defendant contends the trial court erred in failing to stay the sentences for being a felon in possession of ammunition and possessing a loaded firearm while unlawfully under the influence of methamphetamine under section 654. We agree the trial court should have stayed the sentence for possessing a loaded firearm while unlawfully under the influence of methamphetamine; however, we also conclude the trial court did not err in failing to stay the sentence for being a felon in possession of ammunition.

As we have already recounted, defendant was carrying a .22-caliber rifle when he began to flee from Deputy Gassaway. The rifle was loaded with several rounds of live ammunition, and the deputy found a spent cartridge in the firing chamber. In addition, defendant also had a box of .22-caliber ammunition that he threw over the fence along with the rifle. At the time, defendant was under the influence of methamphetamine.

Subdivision (a) of section 654 provides in pertinent part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 prohibits

multiple punishments for a single act or indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.) "The purpose of this statute is to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although . . . distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one of the separate offenses arising from the single act or omission--the offense carrying the highest punishment." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507, quoting *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) In reviewing whether the trial court erred in failing to apply section 654 to a case involving multiple punishments, we are mindful that "the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them." (*People v. Hutchins, supra*, 90 Cal.App.4th at p. 1312.)

Defendant relies on *People v. Lopez* (2004) 119 Cal.App.4th 132 to argue that he cannot be punished for both possession of a

firearm and possession of ammunition. *Lopez* is readily distinguishable, however, because there the defendant's possession of a loaded firearm served as the basis for his conviction of both unlawful possession of a firearm and unlawful possession of ammunition. (*Id.* at pp. 134-135, 137-139.)

Unlike the defendant in *Lopez*, defendant here had bullets loaded in his gun *and* an additional box of ammunition. This evidence demonstrated not only defendant's intent to have a loaded rifle, like the loaded firearm in *Lopez*, but also his separate intent to reload the rifle as needed. Consequently, we agree with the trial court's implied finding that possession of the rifle and possession of the box of ammunition were divisible acts with separate intents. Thus, section 654 does not require defendant's sentence for being a felon in possession of ammunition be stayed.

Defendant next contends section 654 requires a stay of his punishment for possessing a loaded firearm while unlawfully under the influence of methamphetamine. He argues that his possession of the rifle while being a convicted felon and while being under the influence of methamphetamine involved the same act and intent. This contention has merit.

Deputy Gassaway was able to observe defendant only for a very short time before his arrest. The deputy did not see defendant acquire the gun or ingest the methamphetamine found in his blood. In short, no evidence indicated that defendant possessed the gun before he was under the influence of methamphetamine.

Because of the lack of any evidence showing any differentiation in time or in purpose between defendant's possession of the rifle as a felon and as a person under the influence of methamphetamine, section 654 applies to stay the lesser punishment. (See *People v. Bradford* (1976) 17 Cal.3d 8, 22-23 [§ 654 applied because defendant's act of taking peace officer's gun immediately before shooting it at the officer did not constitute separate and antecedent possession of the firearm]; *People v. Venegas* (1970) 10 Cal.App.3d 814, 817-818, 820-821, [multiple punishments prohibited for felon in possession of a firearm and for assault with a deadly weapon when facts failed to show defendant possessed the gun prior to shooting in a bar since evidence suggested he might have obtained it during a struggle immediately prior to the shooting].)

For the foregoing reason, we conclude the trial court erred in failing to stay the punishment for possessing a loaded firearm while unlawfully under the influence of methamphetamine. Accordingly, we will modify defendant's sentence to correct that error.

VIII

*The Trial Court Did Not Abuse Its Discretion
In Sentencing Defendant Consecutively For
Being A Felon In Possession Of Ammunition*

Defendant contends the trial court erred in imposing the sentences for being a felon in possession of ammunition and possessing a loaded firearm while unlawfully under the influence

of methamphetamine consecutively to the sentence for being a felon in possession of a firearm. We agree in part.

Our prior conclusion that defendant's sentence for possessing a loaded firearm while unlawfully under the influence of methamphetamine must be stayed under section 654 obviates the need to discuss at any length the propriety of a consecutive sentence for that charge. In imposing the sentence consecutively, the trial court relied on the circumstance that "[t]he crimes and their objectives were predominantly independent of each other." (See Cal. Rules of Court, rule 4.425(a)(1); *People v. Gutierrez* (1991) 227 Cal.App.3d 1634, 1638.) Because we have agreed already with defendant's argument that this crime involved the same act and intent as being a felon in possession of a firearm, it follows that the crimes and their objectives were *not* predominantly independent of each other. Accordingly, the trial court abused its discretion in imposing a consecutive sentence for possessing a loaded firearm while unlawfully under the influence of methamphetamine.

As for the charge of being a felon in possession of ammunition, we conclude the trial court did not err in imposing a consecutive sentence. As we have explained already, defendant's unlawful possession of a firearm and unlawful possession of ammunition constituted separate acts with different intents. Thus, the trial court did not abuse its discretion in concluding those crimes were predominantly independent of each other and therefore did not err in imposing the sentences for those charges consecutively to each other.

IX

The Trial Court's Dual Use Of Facts Was Harmless

The trial court selected the upper terms for being a felon in possession of a firearm, being a felon in possession of ammunition, and possessing a loaded firearm while unlawfully under the influence of methamphetamine, explaining as follows: "The Court finds that circumstances in aggravation outweigh circumstances in mitigation. Circumstances in aggravation are that the crime was premeditated; defendant has a history of violence or dangerousness, defendant has served [a] prior prison term, the defendant's performance on Probation or Parole was unsuccessful; and the defendant was an active participa[nt] in the crimes. The Court finds no circumstances in mitigation."

Defendant contends the trial court's reliance on his prior prison term as a circumstance in aggravation constituted an improper dual use of facts because the prior prison term also served to enhance his sentence by a year. We agree but find the error harmless.

The People counter that defendant forfeited this argument by failing to object to the imposition of the upper term in the trial court. However, the record shows that defendant filed a statement in mitigation before sentencing in which he objected to use of the prior prison term as a basis for selecting the upper term if the court refused to exercise its discretion to strike the prior as an enhancement. Moreover, defense counsel submitted the matter for sentencing "on our original statement

in mitigation and the objections that I raised in that."

Accordingly, defendant has preserved the issue for appeal.

If the trial court imposes a sentence enhancement for a defendant's prior prison term, the court may not also use the same prior term to justify imposition of the upper term for the current sentence. Subdivision (b) of section 1170 instructs that "the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." Consistent with this statutory provision, California Rules of Court, rule 4.420(c) provides in pertinent part that "[t]o comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so."

Here, the trial court used the same prior prison term to impose an enhancement pursuant to section 667.5, subdivision (b) and to establish as a circumstance in aggravation that defendant had served a prior prison term. Thus, the trial court erred in its dual use of defendant's prior prison term.

However, the trial court also mentioned other circumstances in aggravation. These other circumstances -- including defendant's history of violence and poor performance on parole -- sufficed to justify the upper term, especially given that the trial court found no circumstance in mitigation. (See Cal. Rules of Court, rule 4.421(b)(1) & (5) [defendant's violent conduct and poor performance on parole may be considered circumstances in aggravation].) "'California courts have long

held that a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term for an enhancement.'" (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413, quoting *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.) The trial court's mention of defendant's prior prison term as one of many circumstances in aggravation constituted harmless error because the other cited circumstances in aggravation warranted imposition of the upper term, and it is not reasonably probable the court would have imposed only the middle term if it had not relied on the prior prison term.

X

Defendant Is Not Entitled To Additional Custody Credits

In supplemental briefing, defendant contends he is entitled to recalculation of his custody credits based on a retroactive application of section 4019's recent amendment. (Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) As we will explain, defendant is not entitled to additional custody credits.

As recently revised, subdivision (c)(1) of section 4019 provides that "for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp."

Even assuming for the sake of argument that section 4019 is to be applied retroactively, defendant is not entitled to additional conduct credits. The new custody credit calculus does not apply universally. As pertinent to this case, subdivision (c)(2) of section 4019 specifies the following exception to the day-per-day credit formula: "If the prisoner . . . has a prior conviction for a serious felony, as defined in Section 1192.7, . . . for each six-day period in which the prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp."

As we have explained already, the evidence established that defendant had a prior conviction for a serious felony within the meaning of section 1192.7. Defendant's prior serious felony conviction precludes the application of the day-per-day credits provided by subdivision (c)(2) of section 4019.

DISPOSITION

The judgment is modified as follows: The two prior prison term enhancements under section 667.5, subdivision (b) that the trial court imposed but stayed are stricken. Also, the consecutive 16-month sentence for possessing a loaded firearm while unlawfully under the influence of methamphetamine is stricken, and instead defendant is sentenced on that count to the upper term of six years, to run concurrently to the

principal term, but that term is stayed pursuant to section 654. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment to reflect these changes and to forward a certified copy to the Department of Corrections and Rehabilitation.

ROBIE, J.

I concur:

NICHOLSON, J.

I concur in the majority opinion, with the exception of part IV. I respectfully dissent from part IV, which addresses defendant's assertion of trial court error in failing to conduct a *Marsden*¹ hearing after his trial attorney moved for a new trial on grounds including ineffective assistance of counsel.

I agree with the majority that defendant mistakenly characterizes trial counsel's self-professed declaration of ineffectiveness as a *Marsden* motion. *Marsden* motions refer only to requests for substitution of appointed counsel by defendants themselves. (See *People v. Lara* (2001) 86 Cal.App.4th 139, 150.) Here, defense counsel - rather than defendant himself - presented the claim of constitutionally deficient representation.

However, I respectfully disagree with the majority's conclusion that the trial court had no duty to ascertain anything about the alleged ineffective representation before rejecting the claim.

A

Like the trial court, we do not know the nature or effect of the self-professed ineffectiveness because defense counsel failed to identify the deficiency in his motion for new trial. The trial court did nothing to clarify the laconic assertion of ineffectiveness before ruling: "[I]neffective assistance of counsel. The Court on that ground does not find after I heard

¹ *People v. Marsden* (1970) 2 Cal.3d 118.

the trial that counsel provided ineffective assistance. Counsel has filed numerous motions over the course of this case and made appropriate arguments and questions during the trial. Motion for a new trial is denied as to that ground."

B

Although the claim of ineffective assistance of counsel in this case may have been nothing more than the accidental inclusion of boilerplate language in defense counsel's motion, the claim might also have implicated constitutionally deficient representation. If so, the trial court would have been obligated to grant the motion for a new trial because defendants have the right to effective assistance of counsel. (*People v. Callahan* (2004) 124 Cal.App.4th 198, 209, 212.)

The majority affirm the trial court's denial of the new trial motion by concluding: "Here, the trial court fulfilled its 'obligation to supervise the performance of defense counsel to ensure that adequate representation is provided' [citation] when, despite defense counsel's entirely perfunctory and undeveloped assertion of ineffective assistance in the new trial motion, the court assessed counsel's performance as the court had observed it and concluded it was not deficient."

Undoubtedly, the trial court was able to discern whether defendant's attorney performed adequately in the courtroom. Nonetheless, the court had no basis for evaluating the possibility that counsel's self-professed ineffectiveness related to acts or omissions occurring outside the courtroom. For example, counsel might have failed to investigate a

potentially meritorious defense, failed to disclose a conflict in representation, or forgotten to call a favorable percipient witness.

The facts of this case hearken to those presented in *People v. Stewart* (1985) 171 Cal.App.3d 388, 394 (*Stewart*) [disapproved on other grounds in *People v. Smith* (1993) 6 Cal.4th 684, 691-696]. In *Stewart*, defendant's trial attorney moved for a new trial on the basis of counsel's own ineffective assistance. (*Id.* at p. 393.) As in this case, defense counsel failed to specify the factual basis for the allegation of deficient representation. (*Ibid.*) The trial court in *Stewart* held an in-camera hearing in which the court learned that the allegation related to counsel's failure to call three witnesses: defendant's personal doctor and two percipient witnesses. (*Id.* at p. 394.) The trial court declined to appoint a new attorney to investigate the allegations and denied the motion for new trial on the basis that the claims were "totally unsupported and frivolous." (*Ibid.*) Defendant appealed, and the Court of Appeal reversed. (*Id.* at pp. 398-399.)

As the *Stewart* court noted, "it is for analytical purposes useful to emphasize at the outset that the question whether to appoint new counsel to present a motion for new trial is distinct from the question whether new trial is warranted." (*Stewart, supra*, 171 Cal.App.3d at p. 394.)

To properly consider whether to grant a new trial due to ineffective assistance of counsel, a court needs to know the basis for the allegation of deficient representation. "Where a

defendant requests the substitution of new counsel after trial in order to assist in the preparation of a motion for new trial based on the inadequacy of trial counsel, we believe it imperative that, as a preliminary matter, the trial judge elicit from the defendant, in open court or, when appropriate, at an *in camera* hearing, the reasons he believes he was inadequately represented at trial. . . .

"Once a trial judge is informed of the facts underlying a defendant's claim of inadequate assistance, he is then in a position to intelligently determine whether he may at that point fairly rule on the defendant's motion for a new trial, or whether new counsel should be appointed to more fully develop the claim of inadequate representation." (Stewart, *supra*, 171 Cal.App.3d at pp. 395-396, second italics added.)

When a claim of incompetent representation "relates to courtroom events that the trial court observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant." (Stewart, *supra*, 171 Cal.App.3d at p. 396.) "If, on the other hand, the defendant's claim of inadequate representation relates to something that did not occur within 'the four corners of the courtroom' (Marsden, *supra*, 2 Cal.3d at p. 123) or which cannot fairly be evaluated by what did occur at trial, then, in the sound exercise of its discretion, the court may appoint new counsel to better develop and explain the defendant's assertion of inadequate representation. Substituted counsel should be provided in instances such as this when, after the trial court has made all

inquiries of the defendant and of trial counsel that in the circumstances seem pertinent, it concludes that the defendant has made a colorable claim that he was denied his constitutional right to the effective assistance of counsel. A defendant has made such a colorable claim if he credibly establishes the *possibility* that his trial counsel failed to perform with reasonable competence and that, as a result, a determination more favorable to the defendant *might* have resulted in the absence of counsel's failings." (*Ibid.*; accord *People v. Smith* (1993) 6 Cal.4th 684, 693.)

C

Defense attorneys have an inherent conflict in asserting their own ineffectiveness. On the one hand, they owe a duty to their clients to represent their clients' interests. This includes a duty to inform the trial court of ineffective representation. (See *In re Edward S.* (2009) 173 Cal.App.4th 387, 413 [duty to disclose inability to provide effective representation of indigent criminal defendants].) On the other hand, if counsel were found to be ineffective by the court, that finding could lead to disciplinary proceedings before the State Bar. Indeed, where a judgment is reversed because an attorney is found to have been ineffective, the Court of Appeal *must* report that fact to the State Bar for possible discipline. (Bus. & Prof. Code, § 6086.7.) Consequently, trial counsel may not advance claims of their own ineffectiveness with due vigor.

I see no disruption of the legal process by requiring the trial court, when faced with trial counsel's cursory assertion

of ineffective counsel, to ask simply: "What do you mean?" If the allegation turns out to be nothing more than erroneously included boilerplate, defense counsel can say so, and the proceedings may quickly move on. However, if a colorable claim of constitutionally deficient representation appears, it can be properly explored with the appointment of new counsel for the limited purpose of investigating the underlying circumstances. Colorable ineffectiveness claims - such as in the failure to investigate a potentially meritorious defense or failure to call a credible alibi witness - warrant investigation into the facts by newly appointed counsel. (*People v. Smith, supra*, 6 Cal.4th at p. 693; *Stewart, supra*, 171 Cal.App.3d at p. 396.)

Accordingly, I would vacate the sentence and remand the case to the trial court with instructions to have the trial court ask defense counsel why he asserted his own ineffectiveness. If the inquiry were to lead the court to conclude that a colorable claim of deficient representation exists, the court would have the opportunity to appoint new counsel to fully investigate and properly present a motion for new trial on that basis. However, if the trial court's inquiry were to dispel any colorable claim of ineffective assistance of counsel, the motion for new trial would simply be denied and the defendant resentenced in a manner that corrected the errors identified in the majority opinion.

SIMS, Acting P. J.